Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

DAVID LEE AUSTIN, Petitioner, vs. JOHN AULT, WARDEN, ANAMOSA STATE PENITENTIARY, Respondent.	No. C 02-0064-MWB **MEMORANDUM OPINION AND ORDER REGARDING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE**

This petition for *habeas corpus* relief pursuant to 28 U.S.C. § 2254 comes before the court on petitioner David Lee Austin's February 20, 2004, objections (docket no. 26) to the February 11, 2004, Report and Recommendation by United States Magistrate Judge Paul A. Zoss (docket no. 25) concerning disposition of Austin's petition. Austin seeks *habeas corpus* relief on several grounds, including ineffective assistance of trial and appellate counsel, from his conviction and twenty-year sentence in 1997 for the second-degree sexual assault of his girlfriend's eight-year-old daughter. In his Report and Recommendation, Judge Zoss recommends that Austin's petition be denied, that judgment be entered in favor of the respondent, and that a certificate of appealability be denied.

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the

> court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). However, the plain language of the statute governing review provides only for *de novo* review of "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Therefore, portions of the proposed findings or recommendations to which no objections are filed are reviewed only for "plain error." *See Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir. 1994) (reviewing factual findings for "plain error" where no objections to the magistrate judge's report were filed).

Austin objects to Judge Zoss's recommended disposition of only two of his six claims for *habeas corpus* relief: (1) his claim that he was denied effective assistance of trial counsel, because his trial counsel was unprepared for trial; and (2) his claim that he was denied effective assistance of appellate counsel, because appellate counsel failed to preserve for appeal the issue of trial counsel's ineffectiveness. Therefore, the court concludes that *de novo* review is required only as to those two "ineffective assistance" claims. *See* 28 U.S.C. § 636(b)(1).

In its *de novo* review of the "ineffective assistance" claims, the court begins with a summary of the record and decisions in state court and Judge Zoss's Report and Recommendation in this federal *habeas* action. The record reveals that Austin was charged with second-degree sexual abuse of his girlfriend's eight-year-old daughter, A.H.

Austin had lived with his girlfriend and her three children since December 24, 1995. The abuse allegedly occurred on May 7, 1996, when A.H. came home from school and found only Austin at the apartment. A.H. told Austin that she was supposed to go to her friend's house, but Austin did not believe her, and the abuse occurred when Austin "punished" her for "lying." A.H. told her cousin about the incident, and the report was eventually relayed to her mother. Her mother took A.H. to the doctor, who referred her to a specialist, Dr. Opdebeeck. Dr. Opdebeeck concluded that A.H. had probably suffered vaginal penetration consistent with the alleged assault. The abuse was also allegedly corroborated in a videotaped interview that A.H. had with a social worker prior to Dr. Opdebeeck's examination. Austin was arrested and charged with sexual assault.

The pre-trial phase of Austin's prosecution was not without difficulties. There were various delays in disclosures of evidence and witnesses by the county attorney and Austin became dissatisfied with his two court-appointed attorneys. Five weeks before the scheduled trial date of April 22, 1997, the trial court held a hearing after which Austin's two attorneys were allowed to withdraw and a new attorney was appointed. However, the new attorney promptly left the following week on a previously scheduled vacation. With the agreement of the county attorney, the trial was continued, and the parties scheduled discovery depositions for the first week of May. Unfortunately, the trial was continued only to May 6, 1997, not to May 22, 1997, as the parties had expected. Austin's trial counsel's requests for a further continuance were denied. Therefore, it is undisputed that nearly all of the trial preparation and discovery occurred in the last few days before trial. During discovery, Austin's counsel learned that A.H. had been examined by another doctor, Dr. Oolman, eight days before she was examined by Dr. Opdebeeck, and Dr. Oolman had found no evidence of sexual abuse. The trial court permitted Austin's counsel to depose Dr. Oolman after jury selection on May 6, 1997.

During the trial, in addition to other witnesses, A.H. testified about the alleged assault, and Dr. Oolman testified as a defense witness. A jury convicted Austin of the sexual assault on May 8, 1997, and the trial judge sentenced Austin to twenty years in prison.

Austin filed two motions for new trial, but only the first is relevant here. In that motion, Austin asserted that he was not provided with timely discovery and that he was denied a continuance that would have allowed his counsel to investigate the case properly. The trial court denied both motions and Austin appealed. Austin was represented on appeal by different counsel. He asserted on appeal that his trial counsel was ineffective in failing to object to the imposition of a mandatory minimum sentence, but did assert that his counsel was unprepared for trial. The Iowa Supreme Court affirmed the conviction, but remanded for resentencing. On remand, Austin filed another motion for new trial, in which he argued, *inter alia*, that his trial counsel was ineffective, because he failed to investigate or prepare his case adequately. The trial court denied that motion for new trial, on all grounds, noting that the ineffective assistance claim had not been asserted on direct appeal. Austin did not appeal that ruling.

Instead, Austin filed a petition for post-conviction relief (PCR) in which he argued, again, that his trial counsel was ineffective in not preparing adequately for trial, and also argued that his appellate counsel was ineffective for not appealing on the basis of trial counsel's ineffective assistance. During the PCR proceedings, Austin's trial counsel testified, *inter alia*, that he did not feel as prepared as he would have liked to be, but he was unable to articulate what he would have done differently if he had been given more time to prepare. The PCR court denied relief. On the pertinent issues, the PCR court held that Austin had failed to show "cause" and "prejudice" for failure to assert on direct appeal the ineffective assistance of trial counsel, based on trial counsel's

"unpreparedness," and that, in any event, the record did not show that trial counsel had been ineffective. The PCR court also noted that appellate counsel had been fully aware of the "preparedness" issues, because those issues had been asserted in the first motion for new trial, but appellate counsel had not asserted those issues on appeal. The PCR court concluded that appellate counsel was not ineffective, where trial counsel was not ineffective. Austin did not appeal the ruling denying his application for post-conviction relief, although eventually, on May 6, 2002, he did file the present petition for federal *habeas corpus* relief.

As mentioned above, Austin asserted six claims in his *habeas corpus* petition, all of which Judge Zoss rejected in his February 11, 2004, Report and Recommendation. Also as mentioned above, Austin objects only to the recommended disposition of his claims of ineffective assistance of trial and appellate counsel. In his Report and Recommendation, Judge Zoss rejected the claim of ineffectiveness of trial counsel, as follows:

> The [PCR] court's ruling that Austin had not shown sufficient cause for failing to raise ineffective assistance of trial counsel as an issue on appeal is consistent with *Strickland [v. Washington*, 466 U.S. 668 (1984)], and does not represent an unreasonable application of applicable law, nor was the PCR court's determination of the facts unreasonable in light of the evidence. "[A]ny prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief." *Engle v. Isaac*, 456 U.S. 107, 129, 102 S. Ct. 1558, 1572, 71 L. Ed. 2d 783 (1982). The court finds Austin has failed to satisfy the "cause" prong of the *Strickland* analysis, and this claim should be denied.

Report and Recommendation at 13-14. Judge Zoss also rejected the claim of ineffective assistance of appellate counsel, as follows:

> As noted above, the PCR court found that because Austin had failed to prove his trial counsel was ineffective, he therefore could not prevail on a claim that his appellate counsel was ineffective in failing to preserve the issue of trial counsel's ineffectiveness. The court finds that in ruling on this issue, the PCR court reached legal conclusions that were consistent with, and not contrary to, Supreme Court precedent. The PCR court made a reasonable determination of the facts in light of the evidence, and reasonably applied the law to the facts in the case.
>
> Because the court has found Austin cannot prevail on his claim for ineffective assistance of trial counsel, his appellate counsel's failure to preserve the issue cannot have been ineffective. This claim should be denied.

Id. at 14.

Austin's objections to the recommended disposition of these two claims are as follows:

> In claim (2), Mr. Austin claimed that his trial counsel was ineffective for failing to adequately prepare for trial. The Report states that all of Petitioner's claims are procedurally defaulted or are non-cognizable. However, while citing the standard under Coleman v. Thompson, (citations omitted) of cause, prejudice and fundamental miscarriage of justice, the Report inadequately addresses how the facts in Mr. Austin's case, and it's procedural history, fall squarely under these exceptions to procedural default of claims, as set forth in Petitioner's brief. Specifically, under the standard cited, the findings represent an unreasonable determination of the facts in light of the evidence presented, and it is submitted that cause and actual prejudice have been established by the Petitioner.
>
> In claim (6), Mr. Austin would again submit that his appellate counsel was ineffective for failing to preserve issues on appeal, especially given that the failure to recognize and preserve issues for appeal that are clearly constitutional

> violations against Mr. Austin. Even where the State Court refused to hear the claim, it cannot be said that the conviction and sentence in this case was reasonable or the result of fundamental fairness.
>
> Petitioner would urge the Court to consider the complete record in this case, including all attachments to Mr. Austin's original petition, as well as the record set out by the State, and in doing so, grant Petitioner's Motion under Title 28 U.S.C. § 2254.

Petitioner's Objections to Report & Recommendation (docket no. 26) at 2.

The court finds that Judge Zoss properly summarized the law applicable in this case. Austin does not argue otherwise; rather, he contends that Judge Zoss misapplied or did not fully apply the applicable standards. For present purposes, then, suffice it to say, first, that a federal court may grant *habeas corpus* relief to a state prisoner only if the relevant state-court decision was either (1) "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Second, a claim of "ineffective assistance of counsel" requires the petitioner to prove the following: (1) that "counsel's performance was deficient"; and (2) "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Third, before a petitioner can assert in a federal *habeas corpus* action an "ineffective assistance" claim, or any other claim, not properly raised before the state court, *i.e.*, a "procedurally defaulted" claim, a petitioner must establish (1) "cause" for the procedural default; and (2) "actual prejudice" from the inability to assert the claim. *Engle v. Isaac*, 456 U.S. 107, 129 (1982). Similarly, before Iowa courts will consider on an application for post-conviction relief a claim of "ineffective assistance of counsel" that was not raised on direct appeal, the applicant must

establish by the preponderance of the evidence "sufficient reason" for not having raised the issue at trial and on direct appeal, and also establish "actual prejudice" resulting from the alleged error. *Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991). "Ineffective assistance of appellate counsel may provide 'sufficient reason' to permit the issue of ineffective assistance of trial counsel to be raised for the first time in a proceeding for post-conviction relief." *Id.*

Upon *de novo* review of the record, the court finds that Judge Zoss did not properly articulate the reasons for his conclusion that Austin's "ineffective assistance" claims must be denied. While Judge Zoss stated that Austin has "failed to satisfy the 'cause' prong of the *Strickland* analysis," Report and Recommendation at 14, there is no "'cause' prong" to the *Strickland* analysis of claims of ineffective assistance of counsel. Instead, as noted above, the elements of a claim of ineffective assistance of counsel under *Strickland* are "deficient performance" and "prejudice" from that deficient performance. *Strickland*, 466 U.S. at 687. There is, however, a "cause" prong to the analysis of the issue of whether or not a claim of ineffective assistance of counsel has been "procedurally defaulted." *See Engle*, 456 U.S. at 129 (to overcome procedural default, the petitioner must establish "cause" and "actual prejudice"). Nevertheless, on *de novo* review, the court agrees with Judge Zoss that Austin's "ineffective assistance" claims are procedurally defaulted, without merit, or both.

As the PCR court concluded, Austin's appellate counsel was aware of the issues relating to trial counsel's preparedness, and those issues "were specifically litigated in [Austin's] renewed motion for new trial." *See* Appendix to Respondent's Brief (docket no. 22), Exhibit D, at 2. Nevertheless, appellate counsel's failure to raise on appeal trial counsel's "unpreparedness," where he knew about it, is only "cause" for the procedural default of the "unpreparedness" claim, *if* appellate counsel was himself "ineffective" in

failing to raise the claim. *See Jones*, 479 N.W.2d at 271 (ineffective assistance of appellate counsel can be "cause" for failure to assert ineffective assistance of trial counsel on direct appeal). Whether or not appellate counsel was "ineffective," in turn, depends upon whether or not the "unpreparedness" claim has any merit: If the claim has no merit, then there would be no "prejudice" to Austin in appellate counsel's failure to raise that claim in the sense required to prove an "ineffective assistance" claim, *see Strickland*, 466 U.S. at 687 ("ineffective assistance" requires proof of both "deficient performance" and "prejudice" from the deficient performance), or to avoid procedural default. *See Engle*, 456 U.S. at 129 (overcoming procedural default requires both "cause" for the default and "prejudice" from failure to assert the claim).

This court finds that the PCR court's conclusion that there was no "deficient performance" by trial counsel is correct under the first prong of the *Strickland* analysis of a claim of ineffective assistance of counsel. *See Strickland*, 466 U.S. at 687. This court agrees with the PCR court that the record supports findings that trial counsel did not assert during the PCR hearing that he was "unprepared," but only that he would have been better prepared had he been given more time; that trial counsel was unable to articulate what he would have done, had he been given more time; that Austin was involved in the case, to the extent of submitting numerous filings on his own, and objecting to further continuances of his trial; and that the "substantial amount of activity" in the last eight days before trial was not uncommon. *See* Appendix to Respondent's Brief, Exhibit D at 2-3. Moreover, trial counsel discovered the evidence provided by Dr. Oolman; secured an opportunity to investigate that evidence before submitting it to the jury, by deposition after jury selection; and was able to present that evidence to the jury. Austin has not, himself, articulated any way in which "lack of preparation" actually "prejudiced" the outcome in his trial. *See Strickland*, 466 U.S. at 687 (second prong of the "ineffective assistance" analysis is

"prejudice"). Thus, like Judge Zoss, this court finds that the PCR court's conclusion that the claim of ineffective assistance of trial counsel was without merit was neither "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," nor "involved an unreasonable application of . . . clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Consequently, the PCR court's conclusion that appellate counsel was not "ineffective" for failing to assert the ineffectiveness of trial counsel also is neither "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," nor "involved an unreasonable application of . . . clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The PCR court correctly held that there was no "deficient performance" by appellate counsel in failing to appeal on the basis of trial counsel's performance, where there was no deficient performance of trial counsel to appeal. *See Strickland*, 466 U.S. at 687 (first prong of ineffective assistance claim is "deficient performance"). Moreover, where trial counsel's performance was not deficient, Austin cannot demonstrate that appellate counsel's failure to appeal on the basis of trial counsel's deficient performance "prejudiced" Austin in any way. *Id.* (second prong is "prejudice to the defense"). In the absence of ineffective assistance by appellate counsel, Austin cannot establish "cause" for his procedural default of the underlying claim of ineffective assistance of trial counsel, or any "prejudice" from that default. *See Engle*, 456 U.S. at 129 (procedural default can only be avoided by a showing of "cause" and "prejudice"); *Jones*, 479 N.W.2d at 271 (ineffective assistance of appellate counsel can be "cause" for procedural default of a claim of ineffective assistance of trial counsel).

In short, upon *de novo* review, the court concludes that Austin's claim of ineffective assistance of trial counsel is both procedurally defaulted and without merit, and his claim

of ineffective assistance of appellate counsel is without merit. Therefore, the court will overrule Austin's objections to Judge Zoss's recommendation that Austin's claims of ineffective assistance of trial and appellate counsel be denied and accept Judge Zoss's recommendations as those recommendations are modified herein. The court also finds no "plain error" in Judge Zoss's unchallenged recommendation that all other claims in Austin's petition are procedurally defaulted. *See Griffini*, 31 F.3d at 692 (reviewing factual findings for "plain error" where no objections to the magistrate judge's report were filed).

Austin made no objection to Judge Zoss's recommendation that a certificate of appealability be denied. *See* 28 U.S.C. § 2253(c). This court agrees with Judge Zoss that Austin has made no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2) ("A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Randolph v. Kemna*, 276 F.3d 401, 403 n.1 (8th Cir. 2002) (to meet this standard, "the petitioner 'must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further'") (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.1 (1983)). Consequently, the court will not certify any of Austin's claims for appeal.

THEREFORE,

1. Petitioner David Lee Austin's February 20, 2004, Objections To Report and Recommendation (docket no. 26) are **overruled**;

2. Magistrate Judge Paul A. Zoss's February 11, 2004, Report and Recommendation (docket no. 25) is **modified as explained herein, and as modified, is accepted**. Consequently,

a. Petitioner David Lee Austin's petition for *habeas corpus* relief pursuant to 28 U.S.C. § 2254 is **denied**;

b. **Judgment** in favor of respondent Ault and against petitioner Austin **shall enter accordingly**; and

c. **A certificate of appealability** pursuant to 28 U.S.C. § 2253(c) is **denied** as to all claims in Austin's petition.

IT IS SO ORDERED.

DATED this 22nd day of March, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA